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No. 88-327

In the Supreme Court of the United States

OCTOBER TERM, 1988

BUDDY ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, ET AL., PETITIONERS

v.

RONALD CHISOM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, applies to the election of state court judges.

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INTEREST OF THE UNITED STATES

This case presents the question whether judicial elections are covered by Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. 1973). The United States has primary responsibility for the enforcement of Section 2, which is an important federal statute that prohibits a wide range of racially discriminatory voting or election practices. Any decision in this case will directly affect the government's enforcement responsibilities.

The United States participated in the court of appeals as amicus curiae. In addition, after the court of appeals issued its decision in this case and remanded the case to the district court for trial, the United States intervened in the litigation pursuant to 42 U.S.C. 2000h-2 and is now party plaintiff.

STATEMENT

1. The state of Louisiana provides for the election of the seven justices of the Supreme Court of Louisiana from six judicial districts (Pet. App. 7). The First District, which includes Orleans, St. Bernard, Plaquemines, and Jefferson Parishes, elects two justices at-large (*ibid.*). Each of the other five districts elects one justice. The population of the First District is sixty-three percent white, and sixty-eight percent of registered voters are white (*ibid.*).

On September 19, 1986, respondents, who are black registered voters in Orleans Parish, Louisiana, filed a complaint alleging that the at-large system for electing two state supreme court justices from the First Judicial District diluted black voting strength, in violation of Section 2 of the Voting Rights Act of 1965 (Act), as amended (42 U.S.C. 1973), and the Equal Protection Clause (Pet. App. 6). Respondents alleged that the elections in the First District had been marked by racial bloc voting, that past official discrimination had continuing effects on respondents, that few blacks had been elected to public offices in the district, and that no blacks had been elected to the Louisiana Supreme Court from the First District (*id.* at 8). Respondents also alleged that there was no justifiable basis for singling out the First District for at-large elections (*ibid.*). As relief, respondents sought the division of the First District into two districts, each of which would elect one justice. Such a division would produce one district, consisting of Orleans Parish, with a fifty-five percent black population and a fifty-two percent black registered voter population, and a second district, consisting of the remaining parishes of the First District, with a substantial majority of white voters (*id.* at 7).

2. The district court dismissed the complaint, holding that it failed to state a violation of Section 2 of the Voting

Rights Act (Pet. App. 28-43). The court found that Section 2, by its terms, is violated only when minority voters show that they do not have an equal opportunity "to elect representatives of their choice." Section 2, the court concluded, does not cover judicial elections because judges are not "representatives" (Pet. App. 35-39). The court also relied on the fact that constitutional "one man, one vote" standards do not apply to judicial elections (*id.* at 35), and that the legislative history of Section 2 does not specifically refer to judicial elections (Pet. App. 36-37).

3. A unanimous panel of the court of appeals reversed the district court's judgment and remanded the case for trial (Pet. App. 1-26).

The court noted, first, that the plain language of the Voting Rights Act encompasses judicial elections. The court began by observing that Act seeks to eradicate racially discriminatory electoral practices, and therefore should be broadly construed (Pet. App. 10-12). The original language of Section 2 of the Act (42 U.S.C. (1970 ed.) 1973) prohibited discrimination in any "voting qualification or prerequisite to voting, or standard, practice, or procedure" (Pet. App. 10). Section 14(c)(1) of the Act (42 U.S.C. 1973*l*(c)(1)), defined "voting" as applying to "any primary, special, or general election" and included all action necessary to have votes counted for "candidates for public * * * office" (Pet. App. 13). Because elected judges are such "candidates," the court concluded that the "express terms" of Section 2 cover judicial elections (Pet. App. 12). The court distinguished the "one person, one vote" cases that have excluded judicial elections—on which the district court relied—by pointing out that a claim of dilution of minority voting strength is based on racial discrimination and implicates different statutory and constitutional considerations (*id.* at 14-15).

The court next examined the legislative history to the 1982 amendments to Section 2. The court found that the history of the amendments demonstrates that Congress intended to expand, not to limit, the protection of the Act (Pet. App. 17-21). Congress amended the language of the Act to incorporate in Section 2 the "results" test rejected by a plurality of this Court in *Mobile* v. *Bolden*, 446 U.S. 55 (1980) (Pet. App. 16-21). Under the results test, a violation could be shown without proof that the challenged practice had been intentionally designed or maintained to limit minority voting rights. The language Congress added in 1982 regarding the standard of proof of a violation, including the word "representatives" on which the district court focused, should not be read to *limit* the existing broadly defined coverage of the Act (*id.* at 12, 17-18). The court added that the legislative history indicated that Congress understood Section 2 to cover judicial elections, and that the House and Senate hearings on the Voting Rights Act contained repeated references to judicial elections (Pet. App. 19-20).

Although the case arose under Section 2, the court also looked to judicial construction of Section 5 of the Voting Rights Act of 1965, (42 U.S.C. 1973c). Section 5, which requires preclearance of changes in electoral procedures in some states, has been construed to encompass judicial elections (Pet. 21-22 (citing *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986)). The court pointed out that the language defining the scope of Section 5 is virtually identical to that of Section 2 and that "statutory construction, consistency, and practicality point inexorably to the conclusion that if section 5 applies to the judiciary, section 2 must also apply to the judiciary" (Pet. App. 23). Finally, the court found additional confirmation of its interpretation of Section 5 in the Attorney

General's consistent construction of the Voting Rights Act, and in his view that it covers judicial elections (Pet. App. 23-24).[1]

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this interlocutory decision is not warranted.

1. This case is not yet ripe for review by this Court. The court of appeals, after holding that judicial elections are covered by Section 2, remanded the case for trial. Petitioners are in exactly the same position as they would have occupied if the district court had denied the motion to dismiss. Petitioners offer no reason why this Court should depart from its usual course of declining to grant interlocutory review. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Petitioners assert that this case presents an important question, appropriate for immediate review, because many states elect judges, and that if those elections are subjected to Section 2 coverage, "chaos will ensue" (Pet. 11). As petitioners note, however, there have been very few complaints under Section 2 against judicial electoral systems (see Pet. App. 6-7). Moreover, the lower courts in this case have demonstrated the ability to respond to petitioners' assertions of undue disruption to the state judicial

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[1] The court also held that the district court erred in holding that the complaint did not sufficiently allege a violation of plaintiffs' constitutional rights (Pet. App. 24-25). Further review of that issue is not sought in the present petition.

system from this litigation.[2] If the district court enters a final judgment that the electoral scheme in place in Louisiana violates Section 2, and if such a judgment is affirmed on appeal, petitioners may file a petition for a writ of certiorari at that time.

2. There is no conflict among the courts of appeals on the issue petitioners present. The only two courts of appeals to decide this issue agree that Section 2 applies to judicial elections. The Sixth Circuit, in *Mallory* v. *Eyrich*, 839 F.2d 275 (1988), held that Section 2 applied to judicial elections, and applied a very similar analysis to that adopted by the court of appeals in this case.

3. The court of appeals' decision in this case correctly construes Section 2. There is no support for the view that Congress, when it amended the Voting Rights Act in 1982, created an exception for judicial elections.

a. The plain language of the Act, as it was originally passed in 1965, covered all electoral proceedings, without exception. Section 2 provided (42 U.S.C. (1970 ed.) 1973):

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Section 14 of the Act defined the term "vote" to cover all elections: "[t]he terms 'vote' or 'voting' shall include all action necessary to make a vote effective in *any primary, special, or general election* * * * with respect to *candidates*

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[2] As petitioners acknowledge (Pet. 5 n.1), since the decision on which review is sought, the court of appeals has reversed a district court decision preliminarily enjoining a scheduled October election of a state supreme court justice from the First District. Clearly, the civil litigation rules and procedures have been adequate to protect fully the State's interests.

for public or party office * * * " (42 U.S.C. 1973*l*(c)(1) (emphasis added)).[3]

This Court has summarily affirmed a decision holding that judicial elections are covered by the preclearance requirements of Section 5 of the Act (*Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986)). The language defining the electoral practices covered by Section 5 is identical to that defining the coverage of Section 2, and basic tenets of statutory construction require that it be given the same interpretation. See, *e.g.*, *Pampagna Sugar Mills* v. *Trinidad*, 279 U.S. 211, 217-218 (1929).[4]

b. In 1982, Congress amended Section 2 (42 U.S.C. 1973) to read:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to

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[3] This Court has consistently recognized that Congress intended, when passing the Voting Rights Act, to enact a broad prohibition on voting discrimination. The Voting Rights Act "reflects Congress' firm intention to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966); see also *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 122-123 (1978); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565-566 (1969).

[4] The court of appeals was also correct to note that it would be quite anomalous if Section 5 applied to judicial elections, but Section 2 did not. See Pet. App. 22-23.

> nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Congress thus retained the original coverage language of Section 2(a), and added new language in Section 2(b) to provide guidance on what constitutes a violation of the Act. Petitioners focus on the word "representatives," which is part of Section 2(b), as establishing a congressional exception to Section 2 coverage for the election of judges (Pet. 12-16, 18-26). As the court of appeals concluded, however, Congress did not intend to exclude judicial elections from Section 2 coverage when it amended Section 2 to include that language.

Congress amended Section 2 in response to this Court's decision in *Mobile* v. *Bolden,* 446 U.S. 55 (1980), in which a plurality of the Court concluded that Section 2, as originally written, prohibited only intentional acts of racial discrimination in voting. The 1982 amendments added language explaining that proof of intent was not required to make out a violation of Section 2. See *Thornburg* v. *Gingles,* 478 U.S. 30, 44 n.8 (1986). Accordingly, the objective of Section 2(b) was not to identify the class of elected officials within the statute's reach, but to prescribe the "results" test.

Nor does the legislative history of the 1982 amendments support the argument that Congress used the term "representatives" to exclude judicial elections from the coverage of Section 2.[5] Congress was aware that in some states judges were elected. Witnesses in hearings on the legislation that became the 1982 amendments referred repeatedly to the fact that judges were elected in many states.[6] There is no statement by any member of Congress that inclusion of the word "representatives" in the 1982

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[5] The legislative history of the 1982 amendments shows that the term "representatives" was not used as a narrowing term of art. The language of subsection (b)—"to participate in the political process and to elect representatives of their choice"—is derived from *White* v. *Regester*, 412 U.S. 755, 766 (1973), which used the term "legislators." See S. Rep. 97-417, 97th Cong., 2d Sess. 27 (1982). Members of Congress used the term "representatives" interchangeably with the term "candidates" when discussing the revised Section 2. See S. Rep. 97-417, *supra*, at 16, 28, 30, 32, 67, 100; see also 128 Cong. Rec. 14132 (remarks of Sen. Dole), 14133 (remarks of Sen. Thurmond) (1982).

[6] See *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981). Much of the same sort of evidence was presented at the Senate hearings. See *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 208-209, 669, 748, 788, 789 (1982). Congress had been made aware, when Section 2 was first enacted in 1965, and extended in 1970 and 1975, that some states elected their judges. See, *e.g.*, 111 Cong. Rec. 15722-15723 (1965); 115 Cong. Rec. 38493 (1969); H.R. Rep. 94-196, 94th Cong., 1st Sess. 7 (1975); 121 Cong. Rec. 16241 (1975). Moreover, because there can be a blurring or combining of judicial and nonjudicial duties in state offices, the exception to Section 2 urged by petitioners would be unmanageable.

amendments was intended to exclude judges, for the first time, from Section 2 coverage.[7]

In all events, the natural reading of the term "representatives" does not exclude elected judges in the context of the Voting Right Act. While elected judges do not represent voters in the same way that legislators do, when a state chooses to have an elected judiciary, it establishes a policy that judges will be selected by voters to express and represent the civil and legal views of the community. That is precisely the situation in which the Voting Rights Act seeks to ensure that no minority is denied an equal opportunity to participate in the political processes leading to election.[8]

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[7] In fact, Senator Hatch, who opposed the enactment of the "results" test, stated in separate comments made part of S. Rep. 97-417, *supra,* at 151, that the term " 'political subdivision' encompasses *all* governmental units, including * * * judicial districts * * *." No one disagreed. Cf. *United States* v. *Sheffield Bd. of Comm'rs,* 435 U.S. at 130.

[8] Subjecting elected judges to Section 2 coverage does not mean, of course, that Section 2 necessarily applies to judicial elections in precisely the same way as it applies to other elections. The differing function of judges from other elected officials may influence the factors to be considered in determining if a Section 2 violation has occurred, and what would be an appropriate remedy. These difficult issues are not presented in this case, since the court of appeals' decision dealt only with the question of whether Section 2 covers judicial elections at all. See U.S. Amicus Br. 19-21. Questions of how Section 2 should be applied will arise when there is a specific application of Section 2 to judicial elections (*e.g.,* on the remand in this case).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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